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fect of the court's ruling in striking out defendant's pleas reinstated the office judgment so that it became final by the passing of time under the provisions of Code, § 3287, after which the court was without power to admit evidence as a basis for mending the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 339; Dec. Dig. § 176.* 8 Va.-W. Va. Enc. Dig. 205; 14 Va.-W. Va. Enc. Dig. 602; 15 Va.-W. Va. Enc. Dig. 557.]

3. Corporations (§ 507*)—Process—Service on Agent.—Code 1904, § 3225, requires process against a corporation to be served on the president if he is in the county or corporation wherein the action is brought. By section 3227, the process is required to be served ten days before the return day when service is on an agent, or in a county or corporation other than that in which the action is brought. Held that, where service was not on an agent or in another county or corporation, service at any time before or on the return day was sufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. § 507.* 3 Va.-W. Va. Enc. Dig. 583; 14 Va.-W. Va. Enc. Dig. 260; 15 Va.-W. Va. Enc. Dig. 227.]

Error to Law and Chancery Court of City of Norfolk.

Action by C. W. Hancock & Sons against Jones & Company, incorporated. Judgment for plaintiffs, and defendant brings error. Affirmed.

Kenneth S. Jones, of Norfolk, and *W. H. Moreland*, of Lexington, for plaintiff in error.

Wingfield & Hoag, of Norfolk, for defendants in error.

CHESAPEAKE & O. RY. CO. *v.* NEWTON'S ADM'R.

March 11, 1915. Rehearing Denied June 10, 1915.

[85 S. E. 461.]

1. Continuance (§ 24*)—Grounds—Absence of Witnesses.—Where three of the eyewitnesses to an accident were present at a trial and testified, and it was not probable that the evidence of a fourth eyewitness could have been more than cumulative, the denial of a continuance because of the absence of such witness was not error.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 72; Dec. Dig. § 24.* 3 Va.-W. Va. Enc. Dig. 288; 14 Va.-W. Va. Enc. Dig. 241; 15 Va.-W. Va. Enc. Dig. 205.]

2. Continuance (§ 7*)—Discretion of Court.—A motion for a continuance is always addressed to the sound discretion of the trial court under all the circumstances of the case.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 17,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

18; Dec. Dig. § 7.* 3 Va.-W. Va. Enc. Dig. 272; 14 Va.-W. Va. Enc. Dig. 241; 15 Va.-W. Va. Enc. Dig. 205.]

3. Appeal and Error (§ 966*)—Review—Denial of a Continuance.—

An appellate court will not reverse the judgment of the trial court in the exercise of its discretion on a motion for a continuance unless plainly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.* 3 Va.-W. Va. Enc. Dig. 303, 304; 14 Va.-W. Va. Enc. Dig. 241; 15 Va.-W. Va. Enc. Dig. 205.]

4. Pleading (§ 64*)—Complaint—Duplicity—Injuries to Servant.—

In an action for the death of an employee painting a railroad trestle, and knocked therefrom by a staging which other employees were moving under the direction of the foreman, the declaration alleged that the foreman had the supervision of the men moving the scaffolding; that the employer and its foreman knew that it was dangerous to move it with only three men; that it was the employer's duty not to attempt to move it with only three men; but that the foreman negligently ordered the three men to move it, though he saw or by ordinary care could have seen decedent's danger, and that if the scaffolding was so moved decedent would be struck. Held, that the declaration did not allege separate and distinct causes of action, but concurrent causes co-operating to produce the injury complained of.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.* 11 Va.-W. Va. Enc. Dig. 220; 14 Va.-W. Va. Enc. Dig. 831; 15 Va.-W. Va. Enc. Dig. 805.]

5. Master and Servant (§ 162*)—Liability for Injuries—Negligence of Foreman.—

If plaintiff's intestate was engaged in painting a railroad trestle, and while so engaged the employer attempted to move a swinging scaffold with the aid of three employees, including its foreman, and this was not a sufficient number of men to do the work with reasonable safety to plaintiff's intestate, and thereby he was knocked from the trestle and killed, this was negligence for which the employer was liable, unless plaintiff's intestate was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 327; Dec. Dig. § 162.* 6 Va.-W. Va. Enc. Dig. 14; 14 Va.-W. Va. Enc. Dig. 440; 15 Va.-W. Va. Enc. Dig. 397.]

6. Master and Servant (§ 294*)—Actions for Injuries—Instructions.

—In an action for the death of an employee, the court charged that, if such employee was painting a railroad trestle, and while so engaged the employer attempted to move a swinging scaffold, and if its agents began to move the scaffold towards such employee's back, and to do so was negligence on the part of such agents, including

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

the foreman, and if such foreman had the supervision of the work, or was charged with the duty of directing the immediate work of such employee and the other men, and thereby the accident resulted without negligence of such employee, the jury should find for plaintiff. It appeared that the foreman was a vice principal, and that those moving the scaffold were working under his immediate control, and the case proceeded on the theory that the deceased employee was thrown from the trestle as a result of the foreman's negligence in ordering the scaffold to be moved by an insufficient force to properly handle it. Held, that it was not at all probable that the jury could have been misled by the instruction into believing that there could be a recovery for the negligence of the decedent's fellow servants other than the foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1157-1167; Dec. Dig. § 294.* 9 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 681; 15 Va.-W. Va. Enc. Dig. 661.]

7. Master and Servant (§ 201*)—Liability for Negligence—Concurring Negligence of Vice Principal and Fellow Servants.—If the misconduct of a vice principal enters into and constitutes a part only of the negligent act causing an injury to an employee, the employee's fellow servants also being negligent, the courts will not undertake to distribute the fault, but will hold the employer responsible, as though it alone were guilty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515- 534; Dec. Dig. § 201. 6 Va.-W. Va. Enc. Dig. 17; 14 Va.-W. Va. Enc. Dig. 440; 15 Va.-W. Va. Enc. Dig. 397.]

8. Master and Servant (§ 215*)—Liability for Injuries—Assumption of Risk.—If, as claimed, a scaffolding used in painting a trestle could not be moved by three men without danger to an employee who was on the trestle, and an attempt to move it with three men had never before been made, and in so moving it the work was being done behind such employee and without his knowledge, it was not a risk incident to the manner in which he knew, or in the exercise of ordinary care ought to have known, that the employer conducted its business, and was not assumed by him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 566; Dec. Dig. § 215.* 9 Va.-W. Va. Enc. Dig. 703-709; 14 Va.-W. Va. Enc. Dig. 693; 15 Va.-W. Va. Enc. Dig. 650.]

9. Master and Servant (§ 248*)—Injuries Avoidable Notwithstanding Negligence.—Where a foreman who was having a scaffolding moved by an insufficient force of men was standing where he could see, or by the exercise of ordinary care could have seen, the danger to an employee knocked from the trestle on which he was working, and could have averted the accident by warning him of the dan-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ger, or by directing the men moving the scaffold to stop until such employee could get out of the way, if such employee was negligent, as contended, in being at the place where he was, there was a plain case for the application of the doctrine of last clear chance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 801-804; Dec. Dig. § 248.* 9 Va.-W. Va. Enc. Dig. 698; 14 Va.-W. Va. Enc. Dig. 692; 15 Va.-W. Va. Enc. Dig. 650.]

10. Trial (§ 252*)—Instructions—Applicability to Evidence.—An instruction was properly refused where there was no evidence upon which it could be based.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.* 7 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 563; 15 Va.-W. Va. Enc. Dig. 513.]

11. Trial (§ 252*)—Instructions—Evidence.—Where, in an action for the death of an employee knocked from a trestle on which he was working, there was evidence tending to show that the accident resulted from the attempt of a foreman to move a scaffolding with three men, when four was the least number that could move it with safety, an instruction that there could be no recovery on the ground of any alleged insufficiency in the number of men employed was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.* 7 Va.-W. Va. Enc. Dig. 714; 14 Va.-W. Va. Enc. Dig. 562; 15 Va.-W. Va. Enc. Dig. 512.]

Error to Hustings Court of Richmond.

Action by William W. Newton, administrator, against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

D. H. & Walter Leake and Henry Taylor, Jr., all of Richmond, for plaintiff in error.

L. O. Wendenburg, of Richmond, for defendant in error.

PROVIDENCE FORGE FISHING & HUNTING CLUB, Inc., et al. *v.* GILL.

June 10, 1915.

[85 S. E. 464.]

Vendor and Purchaser (§ 230*)—Bona Fide Purchaser—Notice—Constructive Notice.—Defendant's grantor, who had already contracted to sell complainant 10 acres off of a tract of land, executed a deed of trust on the land, except the 10-acre tract. The trust deed was duly recorded and the 10-acre parcel was conveyed to defendant. Held, that as defendant did not have actual notice of the contract.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.